IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE OCHOA,	)	NOT FOR PUBLICATION
	)	
Petitioner,	)	
v.	)	Case No. PCD 2002-1286
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER GRANTING POST-CONVICTION RELIEF ON PROPOSITION ONE AND REMANDING TO THE DISTRICT COURT OF OKLAHOMA COUNTY FOR A JURY DETERMINATION ON THE ISSUE OF MENTAL RETARDATION

Petitioner, George Ochoa, was convicted by a jury of two counts of First Degree Murder and one count of First Degree Burglary in Oklahoma County District Court, Case No. CF 1993-4302. He was sentenced to death for both murders and to twenty (20) years imprisonment for burglary. We affirmed these judgments and sentences on direct appeal.[1] This Court denied Ochoa's Original Application for Post-Conviction Relief,[2] and his federal habeas is pending in the Tenth Circuit.[3]

On December 2, 2002, Ochoa filed a Second Application for Post-Conviction Relief in a Death Penalty Case. We denied post-conviction relief on Propositions Two and Three and granted Petitioner's request for an evidentiary hearing on Proposition One. *Ochoa v. State*, PCD 2002-1286 (Okl.Cr. December 17, 2002)(not for publication). An evidentiary hearing was held before the

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[1] *Ochoa v. State*, 1998 OK CR 41, 963 P.2d 583, *cert. denied*, 526 U.S. 1023, 119 S.Ct. 1263, 143 L.Ed.2d 358 (1999).

[2] *Ochoa v. State*, No. PC 97-1559 (Okl.Cr. August 4, 1998)(not for publication).

[3] *Ochoa v. Mullin*, No. 02-6032 (10th Cir. 2002)

Honorable Susan Bragg on February 3, 2003, but the scope of that hearing was limited and further remand was required. *Ochoa v. State*, Order Remanding for Further Evidentiary Hearing on Proposition I, PCD 2002-1286 (Okl.Cr. March 27, 2003)(not for publication). Pursuant to the March 27th Order, another evidentiary hearing was held on the issue of mental retardation on August 4, 2003. The district court filed its findings of fact and the transcript of the hearing, and the parties filed responses to those findings.[4]

In *Murphy v. State*, 2002 OK CR 32, ¶ 31, 54 P.3d 556, 566-567, we set forth our three-prong definition of mental retardation. *Id.* In accordance with that definition, we instructed the district court, on remand, to determine whether Ochoa had "raised enough evidence to create a fact question on the issue of whether he is mentally retarded, so that the issue of mental retardation may be decided as a question of fact by a jury at a resentencing hearing."

The trial court stated in its Order on Further Remand from the Court of Criminal Appeals that Petitioner had

> failed to raise sufficient evidence to create a fact question on the issue of mental retardation. Petitioner has presented no evidence of at least one IQ test score of 70 or below. No testing administered prior to or after the commission of the capital crime has ever been scored 70 or below. To the contrary, Petitioner's lowest score has been a 72 with his highest and most recent score being an 86. A score of 86 places Petitioner in the low normal range of intelligence.

[4] Order on Further Remand from the Court of Criminal Appeals was submitted by Judge Bragg on September 18, 2003. Each party filed their Responses on October 9, 2003. The transcript of the hearing was filed on December 4, 2003.

> This Court finds and concludes that there is not prima facie evidence for the issue of mental retardation to be decided as a question of fact for the jury.

All a petitioner needs to show at the evidentiary hearing is sufficient evidence to support the *Murphy* definition of mental retardation. *Murphy*, 2002 OK CR 32, ¶ 39, 54 P.3d at 569, n. 27.

> "[S]ufficient evidence" is essentially the legal equivalent of a defendant making a *prima facie* showing of mental retardation with his or her evidence. *Prima facie* evidence has been defined as "[e]vidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient."

Murphy II, 2003 OK CR 6, ¶ 12, 66 P.3d 456, 457. A defendant needs only to raise a question of fact. If weighing of evidence or credibility determinations are necessary to reach a conclusion, then a question of fact exists and a *prima facie* case has been made. Weighing and determining credibility are functions left to the jury, who should make the determination of mental retardation in the first instance. In this case, the trial court's findings and conclusions focus on the scores Petitioner has achieved on certain intelligence quotient tests and completely disregarded other evidence relating to Petitioner's claim of mental retardation. This is exactly the type of evidence weighing which should be left to a jury.

With regard to the IQ scores of 72 and 75, we note Dr. Hall, who testified at the second evidentiary hearing, testified that a "margin of error" exists with all intelligence tests and that margin of error is accepted by professionals

administering those tests.[5] In addition to Dr. Hall's testimony about the margin of error, Defendant's Exhibit 1 - admitted at the evidentiary hearing, is an excerpt from the DSM-IV,[6] reflects "a measurement of error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument." This excerpt recognizes it is possible "to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." *See* Defendant's Exhibit 1, pps. 39-40. In deciding there was not "sufficient evidence" to create a question of fact on the issue of mental retardation, the trial court weighed evidence and ignored evidence presented at trial and at the evidentiary hearing that Petitioner was borderline mentally retarded, that Petitioner has significant adaptive and functional deficits, and simply focused on the score Petitioner achieved on a "current" IQ test.[7]

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[5] Dr. Hall testified that intelligence quotient tests always have a margin of error. (Tr. 11-12) Although Ochoa scored a 75 on the performance only WAIS-R test administered by Dr. Smith, she said his "true score would fall between 67 and 83." (Tr. 14-15, 20) As to the 72 he achieved on another WAIS-R, performance and verbal test, Dr. Hall testified his "true score would be thought to fall between 67 and 77." Dr. Hall administered another test to Petitioner in July of 2003 and stated he achieved a full scale score of 86. She attributed this higher score to the fact that his verbal IQ had increased dramatically since he has been incarcerated, because he had learned the English language and had learned to read and write. (Tr. 17-18) She testified his performance IQ has not changed much. (Tr. 17) Dr. Hall recently administered the Vineland Adaptive Behavior test to Petitioner to gauge Petitioner's adaptive functioning skills. She testified that at the time of Petitioner's arrest, he would have been in the "0.1 percentile" of communication skills. This score is "very very low" and showed his communication skills were "very poor and developed quite late." (Tr. 25) She saw mild deficits in home living and advanced relationship skills, "significant deficits in the areas of controlling impulses, conforming conduct to the law," significant deficits in self-direction, and substantial deficits in functional academics. (Tr. 26-28) At the time of trial, Dr. Hall agreed that a jury might have concluded that Petitioner was functionally retarded. (Tr. 29)

[6] The Diagnostic and Statistical Manual of Mental Disorders (4th Edition 1994), published by the American Psychiatric Association, is recognized as the most comprehensive classification and reference manual on mental disorders, their manifestations and treatments.

[7] At trial, Drs. Draper and Murphy both testified Petitioner was borderline mentally retarded. *See* Petitioner's Exhibits C and D. Dr. Murphy also recognized that persons who were

The record before us demonstrates Petitioner has significant deficits in area of impulse control, communication skills, self-direction and functional academics, as well as mild deficits in home living. His IQ test scores range from 72 to 86, but the margin of error accepted in the scientific community place his lowest score at 67. His poor school records, Exhibit H to the Second Application for Post-Conviction Relief, may be indicative of his poor mental functioning before the age of eighteen.[8] Regardless of the trial court's findings and conclusions, we examine the record to determine whether Petitioner has raised a fact question on the issue of mental retardation. *Martinez v. State*, 2003 OK CR 25, ¶¶ 9-10, 80 P.3d 142, 144. We find that he has.

Accordingly, this matter is therefore **REMANDED** to the District Court of Oklahoma County for a jury determination on the issue of mental retardation. The trial shall be held within one hundred twenty (120) days of this Order. On remand, the parties are hereby instructed to follow the procedures outlined by this Court in *Lambert v. State*, 2003 OK CR 11, ¶¶ 4-5, 71 P.3d 30, 31-32 and *Salazar v. State*, 2004 OK CR 4, ¶ 7, --- P.2d ---, 2004 WL 171543 (Jan. 29, 2004).

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of April, 2004.

borderline mentally retarded could be trained and rehabilitated, but that mental retardation really does not change. *See* Petitioner's Exhibit D.

[8] *See Murphy*, 2002 OK CR 32, ¶ 31, *f.* 19, 54 P.3d at 567, *f.* 31.

CHARLES A. JOHNSON, Presiding Judge

STEVE LILE, Vice Presiding Judge

DISSENT

GARY L. LUMPKIN, Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

ATTEST:

Clerk

LUMPKIN, JUDGE: DISSENTING

As stated in *Murphy v. State*, 2002 OK CR 32, ¶ 31, 54 P.3d 556, 566-67, "***[N]o person*** shall be eligible to be considered mentally retarded ***unless*** he or she has an intelligence quotient of seventy or below, as reflected by ***at least one*** scientifically recognized, scientifically approved, and contemporary intelligent quotient test."[1] (emphasis added) This language clearly and unambiguously resolves the issue against the Petitioner in this case.

The trial judge reviewed this language from *Murphy* and correctly ruled Petitioner had failed to make a prima facie showing that he is mentally retarded. How could he, or any reasonable trial judge in this State, possibly rule otherwise?

If *Murphy* stands for anything, it is for the unmistakable legal principal that a criminal defendant claiming mental retardation in Oklahoma has to make a threshold showing of at least one legitimate I.Q. test of 70 or below. The Court has repeatedly reaffirmed this objective,

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[1] This language was not created in a vacuum. The requirement of having an I.Q. score of "seventy (70) or below" on a scientifically recognized intelligence quotient test was taken directly from House Bill 2635, which was passed by the House and Senate in 2002, but was ultimately vetoed by then Governor Keating. (House Bill 2635 provided a test score of seventy or below, standing alone, was not sufficient to establish mental retardation. The defendant also had to provide evidence of significant limitations in adaptive functioning and manifestation before the age of eighteen.) Additionally, the same standard is used by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2245, n. 5, 153 L.Ed.2d 335 (2002). There, the Court noted the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders defines one who is mildly mentally retarded as "people with an IQ level of 50-55 to approximately 70." *Id.* Later, the Court noted only five states had executed "offenders possessing a known IQ less than 70 since we decided *Penry*." *Atkins*, 122 S.Ct. at 2249.

threshold tenet. *See Martinez v. State*, 2003 OK CR 25, ¶ 12, n. 2, 80 P.3d 142, 144; *Pickens v. State*, 2003 OK CR 16, ¶ 11, 74 P.3d 601, 604; *Lambert v. State*, 2003 OK CR 11, ¶ 2, 71 P.3d 30, 31. Indeed, in *Snow v. State*, 2004 OK CR 10, __ P.3d __, we noted, in regard to a remanded evidentiary hearing on the issue of mental retardation, that the trial court had expressed frustration at our "bright line rule" requiring an I.Q. test of 70 or below.[2] Nevertheless, we did not modify this threshold.

Now, the Court abruptly disregards the nature of mental retardation and changes the rules, allowing a sliding scale to account for the "margin or error" that exists with all intelligence tests. Murphy too allows for this "margin of error" by permitting a defendant to submit *any* test in which he or she has registered 70 or below. Surely, if this margin of error exists, a defendant will score a 70 or below at some point, if he or she is indeed mentally retarded. More importantly, the Court does not seem to recognize that, by setting the I.Q. requirement at 70 in the first instance, the Court has already taken into account a margin of error.

The Court's order notes Petitioner has I.Q. scores ranging from 72 to 86, but then states "the margin of error accepted in the scientific community place his lowest score at 67." Of course, this is only true if you adjust down. It could equally be said that his lowest score is as high as 77, if one adjusts up. More importantly, Petitioner's continued improvements in I.Q. scores reveal he is not mentally retarded at all.

[2] *Snow* discussed the foundation for this number, although it omitted perhaps the most important source... our Legislature's pronouncement in House Bill 2635.

Rather, he appears to have some sort of learning disability in his past that is unrelated to mental retardation, which by definition would not improve dramatically over time.

It goes without saying that this Court has seen a flood of mental retardation claims in the aftermath of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Murphy* sets forth a clear objective standard that allows trial courts to be informed regarding how to proceed when the issue of mental retardation is raised.

So what happens now? Do all the post-conviction defendants who have had unsuccessful evidentiary hearings and remanded jury proceedings on the issue of mental retardation get do-overs? Do all criminal defendants who have scored a 75 on an I.Q. test now have the ability to raise the issue? What happens to the pending trials, to the cases currently being tried, where the trial court actually attempted to follow what we said in *Murphy*?

Petitioner is not mentally retarded under this Court's definition, and the trial court's ruling on this point was correct. Petitioner's case is easily distinguishable from that in *Martinez*. There, the defendant submitted two I.Q. tests showing scores in the 62 to 63 range. In this case, Petitioner's dramatic improvement in I.Q. in later testing, due to learning to speak English and read and write, are indications Petitioner is simply uneducated, not mentally retarded. *Martinez*, on the other hand, presented the opposite situation, a high score followed by a

dramatically lower one. We questioned whether the later scores were due to medical issues. The point, however, is that mental retardation is not an after-acquired condition, nor is it one that improves over time. We are dealing with eligibility for the death penalty, not matters of guilt or innocence.

I fear the Court has crossed over the line in today's order. *Stare decisis* is now the exception, not the rule. Trial judges will surely be exasperated when trying to ascertain the proper direction to go when mental retardation is raised. No matter. The next decision will tell them why they were wrong to follow what we previously said.[3]

Vacillation is the catalyst of confusion. Appellate courts have a duty to render clear decisions that are capable of being followed. Furthermore, appellate courts must allow the procedures they have established to begin to work through repetition in the trial courts. We will never know if a procedure works unless time is afforded to test those procedures pronounced.

Our decisions affect, not just one case, but also the entire judicial system. This Court does a serious disservice to the legal community, to the citizens of Oklahoma, and to itself when it disregards the definition and nature of mental retardation in order to justify a desired result in a single case. As the Supreme Court put it, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of

[3] *See e.g. State ex rel Lane v. Bass*, 2004 OK CR 14, ___ P.3d ___.

mentally retarded offenders about whom there is a national consensus." *Atkins*, 122 S.Ct. at 2250.